Supreme Court, U.S.
FILED
NOV 18 1999
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(10)

No. 99-150

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

SAMARA BROTHERS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of The International Mass Retail Association As *Amicus Curiae* In Support of Petitioner

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QUESTION PRESENTED

What must be shown to establish that a product's design is inherently distinctive for purposes of Lanham Act trade-dress protection?

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PRELIMINARY STATEMENT

In accordance with Rule 37 of the Rules of this Court, the International Mass Retail Association ("IMRA") submits this *amicus curiae* brief in support of petitioner. All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. Counsel for the IMRA authored this brief in its entirety, and no other person or entity, besides the IMRA itself, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF *AMICUS* INTEREST

At stake in this case is whether a line of children's clothes has a sufficiently distinctive "look" to warrant trade-dress protection, together with the monopoly into perpetuity that comes with it. Because the IMRA believes that this component of the Lanham Act was designed to protect consumers from genuine confusion over the producers of such goods, not to undermine competition in the sales of these basic necessities, it offers this brief for the Court's consideration.

The IMRA is an alliance of retailers, producers and service suppliers, all of whom are committed to providing price-competitive products to domestic and international consumers. In doing so, the association works to improve and expand its members' businesses through industry research and education as well as government advocacy. It also encourages its members to establish relationships, solve problems, and work together for the benefit of the consumer and the mass retail industry. Composed of more than 200 retail companies that operate over 133,000 stores worldwide as well as 600 supplier companies, the IMRA's membership represents over $1 trillion in annual sales at the same time that it employs millions of workers.

The IMRA has a compelling interest in the appropriate standard for establishing whether a product's design is sufficiently distinctive to warrant trade-dress protection. The

lower court extended this protection to entire lines of clothing based merely upon a showing that the items shared a vague, yet allegedly distinctive, "look." Left as is or, worse, affirmed, the decision will create unyielding monopolies over entire classes of basic consumer products, a result at odds both with the letter and the spirit of the Lanham Act, which has long sought to "foster competition" while "protect[ing] the ability of consumers to distinguish among competing producers." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992).

The Second Circuit's approach to this issue thus will harm not just the IMRA's members but the American consumer as well. It will cut off competition in the development of entire varieties of consumer products whenever one producer can convince a jury that a product configuration constitutes a distinctive "trade dress." By too lightly permitting such findings, the Second Circuit's approach will unwittingly permit producers to use trademark law as a monopolistic sword rather than a source identifying shield, thereby preventing the IMRA's members from bringing whole classes of clothing to consumers at affordable, competitive prices. For these reasons and those elaborated below, the IMRA respectfully submits this brief and urges the Court to reverse the decision below.

SUMMARY OF ARGUMENT

Under Section 43(a) of the Lanham Act, one may not use a "word, term, name, symbol, or device . . . which . . . is likely to cause confusion . . . as to the origin . . . of . . . goods." 15 U.S.C. § 1125(a). While the Lanham Act extends to trade-dress "symbol[s]" that cause confusion over the origin of consumer goods, *see Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, the question whether a product design is "inherently distinctive" — and therefore eligible for trade-dress protection — is a rigorous one. Because protection for the configuration of a product, as opposed to merely its packaging, label, name or trademark, risks creating an unending monopoly over an entire product line, a plaintiff seeking such broad

protection "faces the particularly difficult challenge of showing that the appearance of its several products is sufficiently distinct and unique to merit protection." *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 380 (2d Cir. 1997). All lower courts to consider the issue, including the lower court here, agree that "a more stringent test is necessary in the product configuration context" than in the more discrete context of trade-dress protection for a product's packaging. *Fun-Damental Too, Ltd. v. Gemmy Industries Corp.*, 111 F.3d 993, 1001 (2d Cir. 1996).

Accordingly, in order to show that a product design is "inherently distinctive," *Two Pesos*, 505 U.S. at 769, a plaintiff seeking to protect a series of products must meet the following three requirements. It must show that the product design is (1) unique and "capable of carrying meaning," *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 162 (1995), (2) sufficiently specific to be eligible for trademark registration, and (3) conceptually separable from the function of the product itself, *Two Pesos*, 505 U.S. at 769.

In this instance, plaintiff cannot satisfy a single one of these requirements, to say nothing of meeting all three. A product design characterized by seersucker fabric, a conservative cut, a wide collar, and traditional cut-out decorations, yet no defining color or colors, falls well short of the novelty or specificity required to "identify[] a particular source of the product." *Two Pesos*, 505 U.S. at 771. And the so-called "look" of such a configuration represents precisely the kind of "'aesthetic functionality'" that would unduly curb competition. *Qualitex*, 514 U.S. at 170. This claim in the end is ineligible for the kind of sweeping protection from competition that plaintiff is now seeking.

ARGUMENT

Plaintiff seeks trade-dress protection under the Lanham Act for a line of children's clothing that contains five purportedly distinct features: (1) "seersucker fabric," (2) "large bold appliques" (*e.g.*, cut-out decorations fastened to a shirt or dress), (3) "large collars with the appliques generally integrated into the collar and any pockets on the garment," (4) the "general absence of printed images, black outlines, alphanumeric characters, three-dimensional features or heavy ornamentation (such as bibs or fringe)," and (5) "full-cut, one-piece conservative bodies." Pet. App. 13. In granting plaintiff a permanent and exclusive license to make children's clothing with these unremarkable features, the lower court committed reversible error.

Consistent with the language of the Lanham Act and the case law construing it, trade-dress protection for a product's unregistered configuration occurs only when the design of another product is likely to cause confusion as to its producer. That confusion, in turn, occurs only when the configuration is (1) unusual, (2) sufficiently specific in design that it would be eligible for registration in its own right, and (3) conceptually separate from the function of the product itself. As the line of children's clothing at issue here cannot meet a single one of these requirements, the Lanham Act simply does not restrict these sales. The lower-court's decision to the contrary should be reversed.

I. Neither The Language Of The Lanham Act Nor Precedent Establishes That the Amorphous "Look" Of A Line Of Clothing Constitutes A Protectable Trade Dress.

A. The Lanham Act Applies To A "Word, Term, Name, Symbol, Or Device" That "Is Likely To Cause Confusion" Regarding "The Origin" Of The "Goods."

Section 43(a) of the Lanham Act establishes a cause of action against a person who:

> in connection with any goods . . . or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, . . . which . . . is likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin, sponsorship, or approval of his or her goods . . . by another person.

15 U.S.C. § 1125(a). When it comes to clothing and other retail products, product configuration is hardly the first place one would look to gauge whether a producer has caused "confusion" over "the origin . . . of . . . goods." As the terms of the statute suggest, the paradigmatic Lanham Act claim involves a producer who markets his or her goods under a competitor's similar brand "name," similar descriptive "term," or similar "symbol" (*e.g.*, a trademark). In each case, the competitor's use of comparable words or marks risks confusing the consumer about the maker of the goods. No such problem occurred here, however. Though given every opportunity to do so, plaintiff has not created a trademark that would make its clothes distinctive like, say, Nike did with its swoosh, or Polo did with its horse and rider, or Izod did with its alligator. Nor has plaintiff alleged that any competitor has used its name or label in marketing its children's clothes.

Instead, plaintiff claims "trade-dress" protection for an entire line of children's clothing. While section 43(a) of the

Act "does not mention . . . trade dress" as a potential source of confusion for consumers, *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992), the Court has determined that the provision covers a product feature that "can act as a *symbol* that distinguishes a firm's goods and identifies their source," *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 166 (1995) (emphasis added). Such a symbol constitutes "the totality of the elements regarding the *display or packaging* of an item that conveys a 'source'-related commercial impression." Michael A. Epstein, *Epstein on Intellectual Property*, § 7.04[A] at 7-36 (4th ed. 1999) (emphasis added).

Even then, however, plaintiff has not claimed that the "display or packaging" of its clothing amounts to a protected trade dress that defendant has infringed. Instead, still another step removed from a core Lanham Act claim, plaintiff contends that the *product design* of an entire line of clothing is what constitutes the trade-dress symbol and is what allegedly deserves protection.

B. Trade-Dress Protection For A Product's Design Requires Features That Are Unique, Sufficiently Specific To Be Eligible For Registration, And Distinct From the Function of the Product Itself.

Trade-dress protection for the configuration of a product, as opposed to merely its packaging, label, name or trademark, risks creating a perpetual monopoly over an entire product line. A plaintiff seeking such insulation from competition therefore "faces the particularly difficult challenge of showing that the appearance of its several products is sufficiently distinct and unique to merit protection." *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 380 (2d Cir. 1997). Indeed, because product designs frequently contain symbols but are rarely the symbols themselves, "a more stringent test is necessary in the product configuration context" than in the packaging context. *Fun-Damental Too, Ltd. v. Gemmy Industries Corp.*, 111 F.3d 993, 1001 (2d Cir. 1996). Indeed,

all lower courts have recognized, including the court below, that Lanham Act "protection for the design" of a product "is more difficult to obtain" than protection for the display or packaging of a product. Pet. App. 8; *Jeffrey Milsteen, Inc. v. Gregor, Lawler, Roth, Inc.*, 58 F.3d 27, 32 (2d Cir. 1995) ("Courts should proceed with caution in assessing claims to unregistered trade dress protection."); *Nabisco, Inc. v. PF Brands, Inc.*, 50 F. Supp. 2d 188, 199 (S.D.N.Y. 1999) ("The standard for determining the inherent distinctiveness of a product's design is more rigorous than that for determining the inherent distinctiveness of the product's packaging."); *Winner Int'l LLC v. Omori Enterprises, Inc.*, 60 F.Supp.2d 62, 66 (E.D.N.Y. 1999) (trade-dress protection for product configuration is more difficult to obtain than it is for package design). *See Duraco Prods., Inc. v. Joy Plastic Enter., Ltd.*, 40 F.3d 1431, 1433-34, 1440 (3d Cir. 1994).

What, then, is required to show an "inherently distinctive" product design and therefore obtain trade-dress protection in this context? *See Two Pesos*, 505 U.S. at 769. In accordance with the language of section 43(a) and the precedent explaining it, the design must be (1) unique, (2) sufficiently specific to be eligible for registration and (3) conceptually separate from the function of the product.

First, as with virtually all forms of intellectual property seeking shelter from competition, a protected product design must initially be unique. The Lanham Act protects novel configurations, not pedestrian ones. To be "capable of carrying meaning" that "tell[s] a customer" that a product design "refer[s] to a brand," *Qualitex*, 514 U.S. at 162, the configuration must be "unusual and memorable." *Duraco*, 40 F.3d at 1448-49. Whether in shape, color, texture or size, the design itself must "signal a brand or a product 'source.'" 514 U.S. at 163. Otherwise, the design would not be "capable of identifying a particular source of the product," *Two Pesos*, 505 U.S. at 771, which is the requisite precursor to any claim of consumer

"confusion." 15 U.S.C. § 1125(a). To be eligible for protection, in other words, a product's design must at a minimum be sufficiently out-of-the-ordinary to convey its source.

Second, the protected design must be specific in nature. It is common ground that a trademark applicant must propose "a drawing of the mark," 15 U.S.C. § 1051(a)(1)(B), that is particular and specific. There is a similar specification requirement for unregistered trademarks or trade dress. *See Landscape Forms, Inc.*, 113 F.3d at 381 ("focus on the overall look of a product does not permit a plaintiff to dispense with an articulation of the specific elements which comprise its distinct dress"). For this reason, the Court has rejected trademarks that, like "a red or other distinctively colored streak applied to or woven in a wire rope," are too indefinite to be the subject of registration. *A. Leschen & Sons Rope Co. v. Broderick & Bascome Rope Co.*, 201 U.S. 166, 170 (1906). In like manner, a trade-dress product design must not only be sufficiently unusual to convey a source, but it also cannot be so general as to defy meaningful characterization. *See Two Pesos*, 505 U.S. at 774. The transcendent purpose of Lanham Act protection is to assure "a potential customer that . . . the item . . . is made by the same producer." *Qualitex*, 514 U.S. at 164. Yet no such assurance can ever occur if the product lacks the hallmarks of a specific design.

Lastly, and perhaps most importantly in the context of clothing, "eligibility for protection under section 43(a) depends on nonfunctionality." *Two Pesos*, 505 U.S. at 769. That is to say, the design feature at issue cannot simply serve an essential function of the product being peddled. A guitar string is not a protected trade dress of a guitar, and a collar is not a trade dress for a shirt. A "product feature" thus is not entitled to protection if it "is essential to the use or purpose of the article or if it affects the cost or quality of the article." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844,

850-51, nn. 10 & 11 (1982). The same is true "if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage." *Qualitex*, 514 U.S. at 165. The point of "[t]he functionality doctrine" is to "prevent[] trademark law, which seeks to promote competition by protecting a firm's reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature." *Id.* at 164. *See also Restatement (Third) Unfair Competition* § 17 at 172 (1995) ("[D]esign is 'functional' . . . if the design affords benefits in the manufacturing, marketing, or use of the goods or services with which the design is used, . . . that are important to effective competition by others and that are not practically available through the use of alternative designs."). In the last analysis, when form not only follows function but is the function itself, no trade-dress protection exists.

II. Plaintiff's Clothing Line Is Not Entitled To Trade-Dress Protection.

Measured against this test, plaintiff's trade-dress contention plainly fails. As an initial matter, this line of clothing is hardly unique. Consider the five identifiable features of the clothing: (1) "seersucker fabric," (2) "large bold appliques," (3) "large collars with the appliques generally integrated into the collar and any pockets on the garment," (4) the "general absence of printed images, black outlines, alphanumeric characters, three-dimensional features or heavy ornamentation (such as bibs or fringe)," and (5) "full-cut, one-piece conservative bodies." Pet. App. 13.

By any standard, this product configuration is hardly unusual. Seersucker fabric makes up many a garment, not just one. Surely the placement of cut-out figures on children's clothes is not an innovation. Large collars and pockets, whether with cut-out figures on them or not, characterize many a child's outfit. The "absence" of other design features of course defines every clothing item ever sold, not just

respondent's. And a "full-cut" "conservative" design may well describe more lines of children's clothing than it singles out. These run-of-the-mill features simply are not the kinds of product design that can meaningfully symbolize the handiwork of one manufacturer and one manufacturer alone.

Nor, even if one aggregates these common clothing features, does that create an uncommon design. Conservative seersucker clothes, adorned with large collars and cut-out strawberries, hearts, daisies and the like, lack the kind of singular design that would symbolize the identity of any but the most generic of clothiers. And that is particularly true for clothes that do not even have a unifying color or colors. Making matters worse, as Judge Newman correctly pointed out in his dissent below, "nearly one-third" of the clothes in the product line lack one of these "key feature[s]." Pet. App. 34. Surely an entire line of clothes cannot simultaneously have a distinctive "look" yet frequently appear without the very features that purport to create that trade dress. On this record, only a most undiscerning shopper would leap to the conclusion that Samara Brothers, and no other, used these common features in the product design of its children's clothes. Whether one aggregates these design components in full, disaggregates them one by one or even does a little of both, the conclusion is the same: They are not sufficiently unusual to merit trade-dress protection.

Plaintiff fares no better under the lens of the specificity inquiry. Examined singly or as a group, these five features are more amorphous than concrete, and as likely to describe other lines of children's clothing as respondent's own. Everyday descriptions like seersucker, conservative, full-cut, large collars, even the sophisticated-sounding applique, simply do not convey a specific clothing design, and certainly not one that could ever be registered. This sartorial imprecision is itself fatal to respondent's claim.

Even aside from the utter absence of novelty and specificity in respondent's line of children's clothing, the product features are themselves functional and therefore undeserving of monopolistic protection. Take the use of seersucker fabric. It clearly "affects the cost or quality" of the clothes, as does the existence of a generous, conservative cut. *Inwood Laboratories*, 456 U.S. at 850 n.10. And both features would plainly "put competitors at a significant non-reputation-related disadvantage" if respondent were given "exclusive use" of them. *Qualitex*, 514 U.S. at 165. Plus, if respondent were allowed to treat the "general absence" of other adornments as a protected feature of its garments, no manufacturer would ever be immune from Lanham Act litigation. For like reasons, large collars with attractive appliques are "essential to the use or purpose of the article," *Inwood Laboratories*, 456 U.S. at 850 n.10, not only because they affect the "cost and quality" of the clothes but also because most (if not all) parents buy such clothes with appearance-based considerations in the forefront of their minds. No manufacturer of children's clothes, in short, may corner the market on heart-shaped or strawberry-shaped decorations.

Nor does it advance respondent's cause to ask whether the overall "look" of this line of clothing is "functional." Plainly it is. "[D]esign is legally functional, and thus unprotectible, if it is one of a limited number of equally efficient options available to competitors and free competition would be unduly hindered by according the design trademark protection." *Two Pesos, Inc.*, 505 U.S. at 775. In this instance, such product designs have an "aesthetic functionality," which is pleasing to consumers and which affects them in purchasing almost all clothes. *See W.T. Rogers Co., Inc. v. Keene*, 778 F.2d 334, 340 (7th Cir. 1985) (Posner, J.). "The 'ultimate test of aesthetic functionality,' . . . 'is whether the recognition of trademark rights would significantly hinder competition.'" *Qualitex*, 514 U.S. at 170. Because the appearance of such clothes is "essential to the use or purpose of the article" and

certainly "affects the cost . . . of the article," *Inwood Laboratories*, 456 U.S. at 850 n.10, it plainly would hinder competition. Indeed, when it comes to most clothing and most consumers, "[b]eauty is function." *W.T. Rogers Co.*, 778 F.2d at 343. Clothing therefore rarely will receive trade-dress protection merely for its product design, as opposed to obtaining such protection for inaccurate labeling, naming or packaging.

III. Granting Trade-Dress Protection To This Entire Line Of Children's Clothing Would Disserve The Competition-Enhancing Objectives Of The Lanham Act.

In granting plaintiff trade-dress protection for the "look" of its garments, the lower court gave it a monopoly over an entire style of clothes. Left unchanged, all seersucker, conservative baby clothes with distinctive appliques could well be produced by just one United States company. This would limit consumer choice, would restrict competition in the design and form of clothes — an area that has traditionally been free from monopoly — would almost certainly raise prices, and would lead to years of litigation-driven confusion over which clothiers would unjustly benefit from the sudden monopolies that such a ruling would confer.

Nor is this a discrete group of garments. Only a few fabrics are appropriate for baby clothes (cotton, seersucker, gaberdine); there are just a limited number of styles; and there are only a limited number of categories of decorative motifs appropriate for baby clothes (letters and numbers, animals, cars, trucks). To grant a trademark monopoly to any set of these options, it is clear, would "unduly hinder" free competition.

And, yet, the overriding purpose of the Lanham Act is precisely to promote competition. "Section 43(a) does not say, 'Thou shalt not copy.' It says, 'Thou shalt not use a false

designation of origin.'" Ralph S. Brown, *Design Protection: An Overview*, 34 UCLA L. Rev. 1341, 1385 (1987). In point of fact, a defendant "may copy plaintiff's goods slavishly down to the minutest detail"; all the Act prevents is an effort to "represent himself as the plaintiff in their sale." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989) (quoting *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 F. 299, 301 (2d Cir. 1917) (Hand, J.)). Disregarding this admonition, then compounding the error by declining to require plaintiff to identify a discrete, non-functional mark that would identify its products, the Court gave a monopoly to produce clothes of the most general type. While Samara Brothers is for now the beneficiary of that ruling, its competitors and most importantly consumers in general are the victims. It would be a most unfortunate irony if a law designed above all to protect consumers was construed in the end to injure them.

CONCLUSION

For the foregoing reasons, the lower-court decision should be reversed.

Respectfully submitted,

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November 1999